Mansor bin Abas v Sunrise Excelsior (M) Sdn Bhd & Ors and another application

HIGH COURT (IPOH) — POST WINDING UP APPLICATION NOS AA-28PW-42–10 OF 2019 AND AA-28PW-43–10 OF 2019
BHUPINDAR SINGH J
7 SEPTEMBER 2023

Companies and Corporations — Winding up — Proof of debts — Creditors absolutely assigned debts to third respondent — Third respondent lodged proofs of debt with liquidator of debtor — Liquidator admitted proofs of debt — Applications to reverse liquidator's decision in admitting proofs of debt — Whether notice of assignment of debts were given to liquidator — Whether assignment of debts valid — Whether liquidator erred in admitting proofs of debt — Companies Act 2016 s 517 — Companies (Winding-Up) Rules 1972 r 93

Sunrise Excelsior (M) Sdn Bhd ('the first respondent') was wound up based on a judgment in default obtained by Mansor bin Abas ('the petitioner'). Subsequently, a company known as Good Way Trading ('Good Way') and the petitioner had absolutely assigned debts ('the assignments') amounting to RM1,629,800 and RM3,720,000 respectively, which were owed by the first respondent to them, to a company known as Stafford Financial Capital Ltd ('the third respondent'). The third respondent then submitted two proofs of debt to the first respondent's liquidator ('the liquidator') in relation to the said debts ('POD1' and 'POD2' or collectively referred to as 'the PODs') and the liquidator had admitted POD1 and POD2. Chip Lam Seng Enterprise Bhd ('the second respondent') was the majority shareholder and a creditor of the first respondent. The second respondent had also lodged its proof of debt for the sum of RM5,290,137 with the liquidator. However, the liquidator informed the second respondent that he had decided to admit the PODs and that he would only determine the second respondent's proof of debt after the discovery proceeding against the second respondent's auditors had ended. Aggrieved by the liquidator's decision in admitting the PODs, the second respondent filed the present applications to reverse such decision pursuant to r 93 of the Companies (Winding-Up) Rules 1972 and s 517 of the Companies Act 2016. The second respondent had also prayed that POD1 and POD2 be rejected. The issue arose was whether the assignments were valid. In addition to this issue, the second respondent submitted that the judgment in default obtained by the petitioner was void due to undue preference.

Held, allowing the second respondent's applications with costs of RM5,000 for each application to be paid from the first respondent's assets to the second

respondent and the third respondent to pay the costs of RM5,000 to the second respondent:

(1) According to sub-s 4(3) of the Civil Law Act 1956 and the decision in the Federal Court's case of *Sabah Development Bank Bhd v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd)* [2023] 3 MLJ 600, Good Way and the petitioner must give an express written notice to the liquidator to have a valid assignment but in the present case, Good Way and the petitioner did not serve the notice of assignment to the liquidator. It was mandatory for the assignor to serve the notice of assignment to the liquidator. It was not for the assignee to send the notice of assignment to the liquidator. Even if the assignee could validly serve the notice of assignment, it must be done before the lodgement of the PODs, but this was not done in the present case. In addition, the requirement of an express written notice itself indicated that there must be some form of express written notice given to the liquidator and mere lodgement of PODs would be inadequate. The assignee (the third respondent) must prove that there were valid absolute assignments before the assignee could lodge the PODs (see paras 14 & 18–20).

(2) As there were no notices of assignment given to the liquidator, the assignments were invalid, as such no debts were assigned to the third respondent. The liquidator should have rejected the PODs which were based on invalid assignments. Hence the liquidator had committed an error of law in respect of the validity of the assignments. On this ground alone, the decision of the liquidator in admitting the PODs must be reversed (see paras 23–24).

(3) In the present case, when the third respondent lodged the PODs, the liquidator was not satisfied with the documents provided and he had requested further evidence in support thereof, but none was provided by the third respondent. Subsequently, the liquidator applied to the court for directions to admit the PODs which showed that the liquidator was not prepared to accept the PODs based on the documents provided by the third respondent. Further, when the court subsequently ordered the liquidator to determine the PODs lodged by the third respondent, the liquidator decided to admit the PODs without receiving the documents that he had requested earlier. There was no document relating to the works by Good Way and the petitioner provided. In admitting the PODs, the liquidator had considered the invoices despite no original invoices were given to him. The liquidator had also considered the statement of affairs which was devoid of documents. There was no audited report provided by the third respondent to the liquidator. The court was of the view that the liquidator had acted in a way in which no

reasonable liquidator would have acted. He had taken into account irrelevant considerations in admitting the PODs (see paras 26, 30, 39–43 & 46).

(4) In its affidavits, the second respondent had not demonstrated that the judgment in default was obtained by fraud or collusion or that it amounted to a miscarriage of justice. Therefore, the court did not consider it appropriate to go behind the judgment in default. After considering all the arguments by learned counsel, the court was of the opinion that undue preference was not applicable in this case as the POD2 was based on a judgment in default obtained by the petitioner, who later commenced winding up proceedings against the first respondent (see paras 50–51).

[Bahasa Malaysia summary

Sunrise Excelsior (M) Sdn Bhd ('responden pertama') telah digulung berdasarkan penghakiman ingkar yang diperoleh Mansor bin Abas ('pempetisyen'). Selepas itu, sebuah syarikat yang dikenali sebagai Good Way Trading ('Good Way') dan pempetisyen telah menyerahkan hutang secara mutlak ('penyerahan hak tersebut') masing-masing berjumlah RM1,629,800 dan RM3,720,000, yang terhutang oleh responden pertama kepada mereka, kepada sebuah syarikat yang dikenali sebagai Stafford Financial Capital Ltd ('responden ketiga'). Responden ketiga kemudiannya menyerahkan dua bukti hutang kepada penyelesai responden pertama ('penyelesai') berhubung dengan hutang-hutang tersebut ('POD1' dan 'POD2' atau secara kolektif dirujuk sebagai 'POD-POD tersebut') dan penyelesai telah menerima POD1 dan POD2. Chip Lam Seng Enterprise Bhd ('responden kedua') merupakan pemegang saham majoriti dan pemiutang responden pertama. Responden kedua juga telah mengemukakan bukti hutangnya dengan jumlah RM5,290,137 kepada penyelesai. Bagaimanapun, penyelesai memaklumkan responden kedua bahawa dia telah memutuskan untuk menerima POD-POD tersebut dan bahawa dia hanya akan menentukan bukti hutang responden kedua selepas prosiding penzahiran terhadap juruaudit responden kedua berakhir. Terkilan dengan keputusan penyelesai dalam menerima POD-POD tersebut, responden kedua memfailkan permohonan-permohonan semasa untuk membatalkan keputusan tersebut menurut k 93 Kaedah-Kaedah (Penggulungan) Syarikat 1972 dan s 517 Akta Syarikat 2016. Responden kedua juga telah memohon agar POD1 dan POD2 ditolak. Isu yang timbul ialah sama ada penyerahan hak tersebut sah. Sebagai tambahan kepada isu ini, responden kedua berhujah bahawa penghakiman ingkar yang diperoleh oleh pempetisyen adalah terbatal disebabkan oleh keutamaan tak wajar.

Diputuskan, membenarkan permohonan-permohonan responden kedua dengan kos RM5,000 bagi setiap permohonan dibayar daripada aset responden pertama kepada responden kedua dan responden ketiga membayar

kos RM5,000 kepada responden kedua:

(1) Berdasarkan sub-s 4(3) Akta Undang-Undang Sivil 1956 dan keputusan dalam kes Mahkamah Persekutuan *Sabah Development Bank Bhd v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd)* [2023] 3 MLJ 600, Good Way dan pempetisyen mesti memberikan notis bertulis nyata kepada penyelesai untuk memiliki penyerahan hak yang sah tetapi dalam kes ini, Good Way dan pempetisyen tidak menyampaikan notis penyerahan hak kepada penyelesai. Ia adalah wajib bagi penyerah hak untuk menyampaikan notis penyerahan hak kepada penyelesai. Ia bukan untuk penerima serahan hak untuk menghantar notis penyerahan hak kepada penyelesai. Walaupun penerima serahan hak boleh menyampaikan notis serah hak secara sah, ia mesti dilakukan sebelum penyerahan hak, tetapi ini tidak dilakukan dalam kes semasa. Di samping itu, keperluan notis bertulis nyata itu sendiri menunjukkan bahawa mesti ada beberapa bentuk notis bertulis nyata yang diberikan kepada penyelesai dan penyerahan POD-POD tersebut sahaja adalah tidak mencukupi. Penerima serahan hak (responden ketiga) mesti membuktikan bahawa terdapat serahan mutlak yang sah sebelum penerima serahan hak boleh mengemukakan POD-POD tersebut (lihat perenggan 14 & 18–20).

(2) Oleh kerana tiada notis penyerahan hak diberikan kepada penyelesai, penyerahan hak tersebut adalah tidak sah, oleh itu tiada hutang yang diserahkan kepada responden ketiga. Penyelesai sepatutnya menolak POD-POD tersebut yang dibuat berdasarkan penyerahan hak yang tidak sah. Oleh itu penyelesai telah melakukan kekhilafan undang-undang berkenaan dengan kesahihan penyerahan hak tersebut. Atas alasan ini sahaja, keputusan penyelesai dalam menerima POD-POD tersebut mesti diubah (lihat perenggan 23–24).

(3) Dalam kes ini, apabila responden ketiga menyerahkan POD-POD tersebut, penyelesai tidak berpuas hati dengan dokumen yang diberikan dan dia telah meminta keterangan lanjut untuk menyokongnya, tetapi tiada satu pun diberikan oleh responden ketiga. Selepas itu, penyelesai memohon arahan mahkamah untuk menerima POD-POD tersebut yang menunjukkan bahawa penyelesai tidak bersedia untuk menerima POD-POD tersebut berdasarkan dokumen yang disediakan oleh responden ketiga. Selanjutnya, apabila mahkamah kemudiannya mengarahkan penyelesai untuk menentukan POD-POD yang dikemukakan oleh responden ketiga tersebut, penyelesai memutuskan untuk menerima POD-POD tersebut tanpa menerima dokumen yang dimintanya sebelum ini. Tiada dokumen yang berkaitan dengan kerja-kerja oleh Good Way dan pempetisyen disediakan. Dalam menerima POD-POD tersebut, penyelesai telah mempertimbangkan invois walaupun tiada invois asal diberikan kepadanya. Penyelesai juga

telah mempertimbangkan penyata hal ehwal yang tidak mempunyai dokumen. Tiada laporan teraudit yang diberikan oleh responden ketiga kepada penyelesai. Mahkamah berpendapat bahawa penyelesai telah bertindak dengan cara yang mana tiada penyelesai yang munasabah akan bertindak. Beliau telah mengambil kira pertimbangan yang tidak relevan dalam menerima POD-POD tersebut (lihat perenggan 26, 30, 39–43 & 46).

(4) Dalam afidavit-afidavitnya, responden kedua tidak menunjukkan bahawa penghakiman ingkar tersebut diperolehi melalui fraud atau pakatan sulit atau bahawa ia merupakan salah laksana keadilan. Oleh itu, mahkamah tidak menganggap wajar untuk membelakangi penghakiman ingkar tersebut. Selepas mempertimbangkan semua hujah oleh peguam terpelajar, mahkamah berpendapat bahawa keutamaan tak wajar tidak terpakai dalam kes ini kerana POD2 adalah berdasarkan penghakiman ingkar yang diperoleh oleh pempetisyen, yang kemudiannya memulakan prosiding penggulungan terhadap responden pertama (lihat perenggan 50–51).]

Cases referred to

Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor [2007] 2 MLJ 12; [2007] 2 CLJ 405, CA (refd)

Arab Malaysian Merchant Bank Bhd v Sin Hiap Enterprise [1989] 1 CLJ Rep 307, HC (refd)

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman & Ors [1987] 1 MLJ 502 (refd)

Dawodu (a bankrupt), Re [2001] All ER (D) 251 (Jan), Ch D (refd)

Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2023] 3 MLJ 627; [2023] 5 CLJ 1, FC (refd)

Holt v Heatherfield Trust Ltd and G & T Bridgewater Ltd [1942] 1 All ER 404; [1942] 2 KB 1, KBD (refd)

Kejuruteraan Letrik Man Hoe Sdn Bhd v Max-Benefit Sdn Bhd; Cergas Tegas Sdn Bhd (in liquidation) (applicant); Tow Lin Fook (intervener) [2014] 1 LNS 642, HC (refd)

Lim Chiew v Lee Chao Yong & Anor and another appeal [2018] MLJU 956; [2018] 1 LNS 1025, CA (refd)

MAICA Corp Sdn Bhd & Ors v Bina Satu Sdn Bhd (Abdul Karim bin Ibrahim, contributory and I & P Supply Sdn Bhd & Anor, first and second intervenor) [2006] 7 MLJ 277, HC (refd)

RHB Bank Bhd v Granstep Development Sdn Bhd (ML Sepakat Sdn Bhd, third party) [2021] 9 MLJ 249, HC (refd)

Sabah Development Bank Bhd v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd) [2023] 3 MLJ 600; [2020] 4 CLJ 811, FC (refd)

Shruth Ltd; International Brands USA Inc v Goldstein and another; International

Brands USA Inc and another v Haswell and others, Re [2006] 1 BCLC 294, Ch D (distd)
Sunrise Megaway Sdn Bhd (in liquidation) v Kathryn Ma Wai Fong [2021] 3 MLJ 602; [2021] 6 CLJ 39, CA (refd)
UMW Industries Sdn Bhd v Ah Fook [1996] 1 MLJ 365; [1996] 1 CLJ 379, FC (refd)
Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor [2013] 2 MLJ 629; [2013] 3 CLJ 17, FC (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Companies (Winding-Up) Rules 1972 r 93
Companies Act 2016 s 517

Leong Kwong Wah (with Sohan Yong) (T Tharuma & Assoc) for the first respondent.
Poh Choo Hor (Shook Lin & Bok) for the second respondent/applicant.
S Ravenesan (with S Davenesan) (S Ravenesan) for the third respondent.

Bhupindar Singh J:

INTRODUCTION

[1] The second respondent, Chip Lam Seng Enterprise Bhd ('Chip Lam Seng') applied to reverse the decisions of the liquidator of the first respondent, Sunrise Excelsior (M) Sdn Bhd ('Sunrise') in admitting two proofs of debt dated 13 September 2016 lodged by the third respondent, Stafford Financial Capital Ltd ('Stafford') for the sum of RM1,629,800 and RM3,720,000. Chip Lam Seng also prayed that the proofs of debt be rejected.

THE BACKGROUND FACTS

[2] On 5 September 2014, Sunrise was wound up based on a judgment in default dated 8 April 2014 for the sum of RM3,720,000 obtained by one Mansor bin Abas, the petitioner herein ('Mansor'). Mr Chong Chuan Long was appointed as the liquidator of Sunrise ('liquidator'). Chip Lam Seng was wound up on 27 October 2014 pursuant to a winding up order under Kuala Lumpur High Court Companies Winding-Up No 28NCC-639–08 of 2014 and Mr Duar Tuan Kiat was appointed as the liquidator. There are two shareholders in Sunrise, with Chip Lam Seng being the majority shareholder holding 2,970,000 shares and Datuk Lee Heng owning 330,000 shares.

[3] Stafford is a company incorporated under the laws of the British Virgin Islands and with a registered address at 8, Robinson Road ASO Building, Singapore. On 13 September 2016, Stafford submitted two proofs of debt with the liquidator relating to:

(a) a debt for the sum of RM1,629,800 owed by Sunrise to Good Way Trading ('Good Way'), where Good Way absolutely assigned the debt to Stafford via a deed of assignment dated 18 September 2014 ('POD1'); and

(b) a debt for the sum of RM3,720,000 owed by Sunrise to Mansor, where Mansor absolutely assigned the debt to Stafford according to a deed of assignment dated 18 September 2014 ('POD2', collectively referred to as 'PODs').

[4] Mr David Abraham Samson Paul a Malaysian citizen having an occupational address at No 48–1, Level 1, Jalan Telawi, Bangsar Baru, 59100 Kuala Lumpur and a director of Stafford admitted that he signed the assignments dated 18 September 2014 on behalf of Stafford, as no name was stated in both of the assignments.

[5] Besides the assignments, POD1 was supported with four invoices issued by Good Way and POD2 was attached with 19 invoices issued by Mansor together with the judgment in default dated 8 April 2014. Original invoices were not submitted to the liquidator. In the process of adjudicating the PODs, the liquidator requested further supporting documents from Stafford vide letters dated 4 October 2017 and a reminder dated 30 April 2018 was addressed to Stafford's solicitors concerning Good Way and Mansor debts. Stafford's solicitors replied through a letter dated 11 May 2018 enclosing the letters dated 18 August 2014 acknowledging the debts by Sunrise.

[6] Again, vide letter dated 25 May 2018, the liquidator demanded more documents or evidence from Stafford to substantiate the amount claimed in the PODs. In a letter dated 25 June 2018, the solicitors of Stafford answered by saying that Stafford had provided all the necessary documentation to the liquidator for the distribution of Sunrise's assets. Mr Tan Keng Beng, a director of Sunrise, admitted vide letter dated 28 June 2018 that he signed the confirmation of debts as stated in Stafford's letters dated 18 August 2014.

[7] Subsequently, the liquidator filed a forms of summons on 11 March 2019 in this court vide Post Winding Up Application No AA-28PW-2–03 of 2019 for the directions to admit the PODs on such terms and conditions as this court thinks just. On 24 July 2019, Anselm Charles Fernandis JC (as he then was) granted an order that the liquidator be directed to determine the PODs lodged by Stafford.

[8] Chip Lam Seng is also a creditor of Sunrise. On 14 December 2018, Chip Lam Seng lodged its proof of debt for the sum of RM5,290,137 with the liquidator. Accordingly, Chip Lam Seng was informed by the liquidator of his decision to admit POD1 and POD2 on 13 September 2019 via an email attaching the liquidator's letter dated 12 September 2019 addressed to all the creditors of Sunrise. The liquidator informed that he will determine the proof of debt lodged by Chip Lam Seng after the discovery proceeding against the auditors of Chip Lam Seng, Messrs TH Yew & Co ends. Dissatisfied with the liquidator's decision in admitting the PODs, Chip Lam Seng filed the present applications to appeal against the decision (Post Winding Up Application No AA-28PW-42–10 of 2019 is for POD1 and Post Winding Up Application No AA-28PW-43–10 of 2019 is for POD2).

THE LAW

[9] In these applications, Chip Lam Seng sought to reverse the liquidator's decision in admitting the PODs lodged by Stafford based on r 93 of the Companies (Winding-Up) Rules 1972 and s 517 of the Companies Act 2016.

[10] In *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12; [2007] 2 CLJ 405 the Court of Appeal laid down the position of law where there is a challenge against the liquidator's decision:

> The court will not interfere with the decision simply because its opinion might differ from that of the liquidator. Generally, the court will recognise that the discretion has been vested by statute in the liquidator and will not interfere unless it is shown that he did not address himself to the correct questions or has made errors of law (see *Avon Downs Pty Ltd v FC of T* [1949] 78 CLR 353; *Re Mineral Securities Ltd* [1973] 2 NSWLR 207) or has not exercised his discretion bona fide or has acted in a way in which no reasonable liquidator would have acted (see *Leon v York-O-Matic* [1966] 1 WLR 1450) or has taken into account entirely irrelevant considerations (see *Yeomans v Walker & Anor* [1986] 10 ACLR 753) or when there is fraud.

(See also: *Sunrise Megaway Sdn Bhd (in liquidation) v Kathryn Ma Wai Fong* [2021] 3 MLJ 602; [2021] 6 CLJ 39; *Lim Chiew v Lee Chao Yong & Anor and another appeal* [2018] MLJU 956; [2018] 1 LNS 1025 and *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629; [2013] 3 CLJ 17).

ISSUES AND FINDINGS OF THE COURT

The validity of the absolute assignments

[11] The substratum of the claim by Stafford is based on two assignments dated 18 September 2014 executed with Good Way and Mansor. These

assignments were executed after Sunrise was wound up. The first issue to be decided is whether the assignments are valid.

[12] Subsection 4(3) of the Civil Law Act 1956 provides for an absolute assignment, where it is stipulated that:

> (3) *Any absolute assignment*, by writing, under the hand of the assignor, not purporting to be by way of charge only, *of any debt* or other legal chose in action, *of which express notice in writing has been given to the debtor*, trustee or other person from *whom the assignor would have been entitled to receive or claim the debt* or chose in action, *shall be*, and be deemed to have been, *effectual in law*, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, *to pass and transfer the legal right to the debt or chose in action, from the date of the notice*, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. (Emphasis added.)

[13] The Federal Court in *Sabah Development Bank Bhd v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd)* [2023] 3 MLJ 600; [2020] 4 CLJ 811 referred to its earlier decision in *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365; [1996] 1 CLJ 379 where the conditions of a valid absolute assignment was deliberated and held:

> [72] The case of *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365; [1996] 1 CLJ 379, a decision of this court, sets out the conditions necessary for effecting an absolute legal assignment under s 4(3) of the Civil Law Act 1956. The conditions are:
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> (a) the 'debt or other chose in action' must be one that is existing;
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> (b) the assignment must be in writing under the hand of the assignor;
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> (c) the assignment must be absolute and not by way of charge only; and
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> (d) there must be express written notice of the assignment to the obligor.

[14] The parties do not dispute the fact that the assignments are absolute assignments. Both assignments have the heading of 'Absolute Assignment' and use the words 'the Assignor assigns absolutely the Debt to the Assignee including the right to sue for recovery thereof' (see: *Sabah Development Bank Bhd*). According to sub-s 4(3) of the Civil Law Act 1956 and the above case, Good Way and Mansor must give an express written notice to the liquidator to have a valid assignment.

[15] The documents show that Good Way and Mansor gave notice to Sunrise, instead of the liquidator. Besides, the notice of assignment by Good Way and Mansor is not dated and there were no acknowledgments of receipt by Sunrise for both of the assignments. The assignments clearly stated that 'Please

acknowledge to the Assignee the receipt of this Notice in the form attached'. No forms were produced in evidence before this court. Good Way and Mansor failed to prove that the notice of assignment was served and received by Sunrise.

[16] In *Holt v Heatherfield Trust Ltd and G & T Bridgewater Ltd* [1942] 1 All ER 404; [1942] 2 KB 1 the court, in considering the English provision, which is in pari materia with sub-s 4(3) of the Civil Law Act 1956, held:

> The date of 'such notice' is the date of a notice which has been given to the debtor, and refers back to the express notice in writing mentioned earlier in the section. It is express notice in writing given to the debtor, and in my judgment, the date of that notice is the date on which it is received by or on behalf of the debtor.

Similarly, in *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman & Ors* [1987] 1 MLJ 502 the High Court at p 510 held:

> It is essential under s 4(3) of the Civil Law Act that express notice in writing of the assignment must be given to Hashim. The assignment operates from the date of the notice, that is, date on which it is received by or on behalf of Hashim *The legal assignment is only complete on the date the notice is received by the debtor*.

[17] Siti Norma Yaakob J (as she then was) in *Arab Malaysian Merchant Bank Bhd v Sin Hiap Enterprise* [1989] 1 CLJ Rep 307 relating to notice assignment by the assignor, said:

> For all practical purposes, the factoring agreement is an assignment of all Fung Yen's debts to the plaintiff.
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> By its letter of notification dated 5 July 1985, *Fung Yen then notified the defendant* that following its arrangement with the plaintiff, the defendant was to make payment of the sums due on the invoices directly to the plaintiff. The defendant acknowledged receipt of this notification by confirming their awareness of the factoring arrangement Fung Yen had with the plaintiff as well as the sum due from them
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> In this case, *the defendant had acknowledged receipt of the letter of notification* and even assuming that the defendant's stamp and signature on the letter have not been duly authorised by the defendant, this is of no concern to the plaintiff as *the defendant's liability arises upon receipt of the letter of notification*. (Emphasis added.)

(See also: *RHB Bank Bhd v Granstep Development Sdn Bhd (ML Sepakat Sdn Bhd, third party)* [2021] 9 MLJ 249).

[18] In these applications, it is my finding that the assignments are invalid and unenforceable because Good Way and Mansor did not serve the notice of assignment to the liquidator. Nothing has been provided to show that Good Way and Mansor as the assignors have served the notice of assignment to the liquidator or that the liquidator has received any notice from them. Therefore,

since the liquidator as the debtor did not receive any notice of assignment from the assignors, the legal requirements of an absolute assignment are incomplete and the assignments are bad in law.

[19] Learned counsel for the liquidator and Stafford submitted that there is no time limit to serve the notice. It was further argued that when the liquidator received the PODs from Stafford on 13 September 2016, together with the deeds of assignment and notices of assignment, there was sufficient notice to the liquidator. I am of the view that it is mandatory for the assignor to serve the notice of assignment to the liquidator. It is not for the assignee to send the notice of assignment to the liquidator. Even if the assignee could validly serve the notice of assignment, it must be done before the lodgement of the PODs. Here, there is no notice of assignment given by Stafford to the liquidator before lodging the PODs. There is no evidence to show that the liquidator received any notice of assignment from Stafford regarding the PODs before Stafford lodged the PODs.

[20] In addition, the submission of the PODs by Stafford cannot in law be equated with 'express written notice given to the debtor'. The requirement of an express written notice itself indicates that there must be some form of express written notice given to the liquidator and mere lodgement of PODs will be inadequate. The assignee (Stafford) must prove that there are valid absolute assignments before the assignee can lodge the PODs. The Federal Court in *Sabah Development Bank Bhd* observed that:

> [77] From the contemporaneous documents in the appeal records, *express notices of assignment* of the contract proceeds *had been given by Swakaya (assignor)* and the bank (assignee) *to SESB (obligor)* on 20 March 2013, 20 November 2013 and February 2014. By these notices SESB was notified that Swakaya had obtained loan facilities from the bank and requested that all contract proceeds due under the contract be assigned and remitted directly into initially the first project account, later the second project account for the bank.
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> [78] SESB's responses in writing dated 22 March 2013 and 28 February 2014 (for the second project finance account) proved that it expressly consented to the assignment in writing.
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> [79] The effect of such consent is comprehensively set out in the old case of *Metzgar ex rel Uhler v Metzgar*, 1 Rawle 227 (1829) from the United States of Amehca, where Gibson, CJ agreed that '*notice puts an end to all privity between the assignor and obligor, and the assignee becomes the owner of the bond*, subject to any existing equity against the obligee. After the notice of the assignment, *a new contract arises between the obligor and the assignee*, who holds a chose in action no more negotiable than it was in the hands of the obligee'. (Emphasis added.)

[21] The Federal Court in *UMW Industries* concerning the notice of assignment to the debtor, held:

A Section 4(3) of the Civil Law Act 1956 does not, and, for that matter, there is, as we understand, *no law prescribing any limit of time within which notice must be given to the debtor*, trustee or other person from whom the assignor would have been entitled to claim the debt or chose in action eg a guarantor. *All that the said s 4(3)1 requires is that 'express notice in writing' be given*. Hence notice may be given after the death
B of the assignor *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104, or after the death of the assignee *Bateman v Hunt* [1904] 2 KB 530 CA. *Notice, however, must be given before the assignee takes out its writ*. (Emphasis added.)

[22] It is clear from the above cases that Good Way and Mansor must give
C express written notice relating to the assignment to the liquidator. Stafford failed to address why there was no notice of assignment given by Good Way and Mansor. Most importantly, no notices of assignment were given to the liquidator before Stafford lodged the PODs.

D **[23]** Consequently, as there are no notices of assignment given to the liquidator, the assignments are invalid, as such no debts were assigned to Stafford. The PODs lodged by Stafford must be rejected.

E **[24]** From the facts before this court, it is clear that the liquidator had doubts of the validity of the assignments. The liquidator did not accept the assignments when the PODs were lodged. He also applied to this court for directions to admit the PODs. The liquidator also averred that he sought legal advice in respect of the adjudication of the PODs and the filing of the
F application for directions. As I understand, the order dated 24 July 2019 directed the liquidator to determine the PODs lodged by Stafford on 13 September 2016, which means the liquidator is to decide whether to accept or reject the PODs based on the available evidence. There is no evidence that the notices of assignment were served to the liquidator and the liquidator
G should have rejected the PODs which are based on invalid assignments. Hence the liquidator has committed an error of law in respect of the validity of the assignments. On this ground alone, the decision of the liquidator in admitting the PODs must be reversed.

H *POD1 and POD2 — And proof thereof*

[25] The Federal Court in *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2023] 3 MLJ 627; [2023] 5 CLJ 1 regarding the proof of debt held:

I [17] The Companies (Winding-Up) Rules 1972 ('the WUPR') governs the pre and post-winding up procedures. Rule 78 of the WUPR provides that every creditor shall prove his debt. In certain cases, the judge may give directions that debts be admitted without proof. The mode of proof as prescribed under the WUPR is by submitting to the liquidator, an affidavit verifying the debt. Rule 81 of the WUPR

provides that an affidavit proving a debt may be in the form prescribed and shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The liquidator may at any time call for the production of the vouchers or any supporting documents.

[18] Rule 92 of the WUPR states that the liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it ...

[26] *The liquidator must meticulously examine the POD lodged by the creditor*. After having examined the claim together with supporting documents, the liquidator must decide whether to accept or to reject the POD. (Emphasis added.)

[26] As stated at the outset, only four invoices were issued by Good Way for POD1 and 19 invoices were issued by Mansor for POD2. When Stafford lodged the PODs, the liquidator was not satisfied with the documents provided and he requested further evidence in support thereof. According to the letter dated 4 October 2017 addressed to Stafford relating to POD1, the liquidator stated:

3. We further refer to the Proof of Debt lodged by you dated 13th September 2016. *Please provide us with the following supporting documents to substantiate the claims made*:

(i) The name or details of the projects the claimed work was involved in;

(ii) Contracts between the Company and Good Way Trading;

(iii) Certification or proof that the work that was billed in the supporting invoices was completed;

(iv) Any other relevant documents that may assist in substantiating your claim.

4. Kindly revert within fourteen (14) days from the date hereof. (Emphasis added.)

The same letter was also issued by the liquidator to Stafford regarding POD2, with the necessary amendments, concerning the debt owed to Mansor.

[27] It is pertinent to note that Stafford did not furnish any of the documents demanded by the liquidator. Instead, Stafford's solicitor replied through a letter dated 11 May 2018 about seven months later and attached the acknowledgment letters dated 18 August 2014 where the director of Sunrise, Mr Tan Keng Beng admitted that the debts were still due and owing to Good Way and Mansor. I must add that not a single document was attached by Stafford's solicitors in the said acknowledgments to substantiate the PODs.

[28] If the liquidator was satisfied with the acknowledgment of debts by Mr Tan Keng Beng, he would have admitted the PODs without further proof. The facts reveal that the liquidator was still not confident to admit the PODs. Consequently, the liquidator wrote again to Stafford's solicitor vide letter dated 25 May 2018 and said:

> *Kindly provide the further documents/evidence to substantiate the amount claimed as stated in the above said Proof of Debts* which may include but not limited to the following:
>
> (a) Letter of Award/Offer/Appointment/Acceptance;
>
> (b) Contract Documents or Agreements;
>
> (c) Site Plan, Layout Plan or any of the worksite location plan;
>
> (d) Certificate of Completion or Proof of work done ie Photos, Delivery Order, or documents acknowledgment of work done or good delivered;
>
> (e) Any correspondence between you and the Company; and
>
> (f) Any other documents or information which may be pertinent or relevant to the work done.
>
> *Please let us have your response* within fourteen (14) days from the date hereof *to enable us to adjudicate the said Proof of Debts* in a timely manner. (Emphasis added.)

[29] Invoices by Good Way and Mansor show that work has been done for millions of Ringgits. Certainly, there must be at least some documents offering the works, correspondence between the parties, details of the works and their locations and proof that the works have been completed. Therefore, the liquidator acted reasonably in demanding Stafford's solicitors to provide further documents and evidence to substantiate the claims in the PODs. The burden is on the creditor to prove the claims. Unfortunately, Stafford's solicitors instead of providing the documents as requested, responded by stating that Stafford had provided all necessary documentation for the purpose of the PODs. It is significant to note that Stafford's solicitors besides relying on the invoices did not supply a single document relating to the works.

[30] In this case, Stafford signed the assignments with Good Way and Mansor for huge sums of money. In the process, it is prudent that Stafford procures the documents for the works done by Good Way and Mansor. Furthermore, Stafford would need it to substantiate the PODs. When the liquidator requested further documents and evidence, Stafford could easily obtain the documents from Good Way and Mansor as they performed the works for RM1,629,800 and RM3,720,000, respectively. Be that as it may, since the liquidator did not obtain a single additional document from Stafford's solicitors, he applied to this court for directions to admit the PODs. The action of the liquidator shows that at this juncture, he was not prepared to accept the

PODs based on the documents provided by Stafford. If the liquidator was convinced with the documents supplied by Stafford, he would have admitted the PODs without seeking the court's directions. A

[31] Reverting to the directors of Sunrise, from the minutes of the meeting of the contributories of Sunrise held on 14 September 2016 it is clear that the directors of Sunrise failed to deliver to the liquidator any statement of affairs, books, files, records, documents which were in their possession. The liquidator had to initiate legal proceedings against the directors on 25 May 2015 and obtained an order on 6 August 2015 to compel Datuk Lee Heng and Mr Tan Keng Beng to deliver the statement of affairs within 14 days from the date of the order. B C

[32] It was also ordered, inter alia, that within 14 days from the date of the order, the directors deliver, convey, surrender and/or transfer to the liquidator such books, records, documents and property of Sunrise including statements, invoices, delivery orders, vouchers, correspondences, contracts, and/or agreements in regard to all Sunrise's debtors. D

[33] In the same minutes of the meeting, it is reported that Tan Bee Yong, another director of Sunrise reiterated that she did not run the day-to-day operations and management of Sunrise and neither she was in possession of any of Sunrise's books, records, documents or assets. She further informed that the operations and management of Sunrise were run by Mr Tan Keng Beng. A statement of affairs dated 18 August 2015 was filed by Tan Bee Yong. Sunrise's directors did not surrender any document relating to Sunrise's debts to the liquidator. E F

[34] Subsequently, the liquidator applied for leave to commence committal proceedings against Datuk Lee Heng and Mr Tan Keng Beng as they failed to comply with the court's order dated 6 August 2015. On 2 February 2016, leave to commence the committal proceedings was granted. According to the above minutes of the meeting, on 15 February 2016 Mr Tan Keng Beng requested that the committal proceedings be deferred to allow some time to locate and surrender Sunrise's records. G H

[35] Vide letter dated 28 June 2018, Mr Tan Keng Beng wrote to the liquidator and stated: I

> Sorry to inform that I am unable to provide those documents as requested by you. This is because I have yet to locate the books and records of the Company as stated in my letter dated 15.2.2016.
>
> However, I can confirm that I signed the confirmation as stated in Stafford Financial Capital Limited's letters dated 18.8.2014.

A He further confirmed that the debts due and owing to Good Way and Mansor remained outstanding until Sunrise was wound up. Mr Tan Keng Beng never surrendered a single document pertaining to the works by Good Way and Mansor to the liquidator.

B **[36]** I read the documents relating to this case in the case management system and found out that another application for committal proceedings was filed on 14 October 2019 and leave to commence committal proceedings was granted on 9 December 2019. On 6 October 2020, an order of committal was granted against Datuk Lee Heng for the failure to comply with the order of court dated 6 August 2015 and he was fined RM5,000 in default one month of imprisonment.

[37] Mr Tan Keng Beng managed to evade service as the address stated in his letter dated 28 June 2018 and the Companies Commission of Malaysia search is an old folks home. The residents there did not know his whereabouts. There was another address but the premises was closed and locked (see 28NCC-27–06 of 2014, encl 36).

E **[38]** Taking into consideration the background facts relating to Mr Tan Keng Beng, I can comprehend why the liquidator was reluctant to accept the acknowledgment of debts by Mr Tan Keng Beng via letters dated 18 August 2014 and 28 June 2018. Furthermore, it is only a mere admission by Mr Tan Keng Beng and not a single document was given to substantiate the works done F by Good Way and Mansor. It is not difficult to make an unsubstantiated admission or confirmation, anybody can do that. In order to be accepted, the confirmation or admission must be supported with some documents. Even at this juncture, the liquidator did not admit the PODs.

G **[39]** Finally, on 11 March 2019 the liquidator applied to this court for direction to admit the PODs but was ordered to determine the PODs lodged by Stafford. Surprisingly, the liquidator has now decided to admit the PODs without receiving the documents requested in his letters dated 4 October 2017 and 25 May 2018. The circumstances were the same as before when he H quarried Stafford and the directors of Sunrise for documents and evidence to substantiate the amount claimed in the PODs. Nothing was supplied to the liquidator concerning the works performed by Good Way and Mansor. So, on what basis did the liquidator decided to admit the amount claimed in the PODs?

I **[40]** To my mind, the liquidator has acted in a way in which no reasonable liquidator would have acted. He has taken into account irrelevant considerations in admitting the PODs. Certainly, the liquidator did not address himself the correct questions in making his decision because the proper

and valid questions presented vide his letters dated 4 October 2017 and 25 May 2018 were never answered. Instead of addressing or considering these significant issues raised before, the liquidator chose to ignore them and decided to admit the PODs. Surely, the liquidator's action is utterly unreasonable.

[41] The liquidator considered the invoices despite no original invoices were given to him. The case of *MAICA Corp Sdn Bhd & Ors v Bina Satu Sdn Bhd (Abdul Karim bin Ibrahim, contributory and I & P Supply Sdn Bhd & Anor, first and second intervenor)* [2006] 7 MLJ 277 was referred by learned counsel for Stafford in support thereof. It is clear that in *MAICA Corp* it was not possible to produce the originals of some of the documents since they had been destroyed in a fire. The liquidator then directed reprinted copies to be submitted as the liquidator already had possession of the original copies of the delivery orders.

[42] On the contrary, in this case without a single document relating to the works by Good Way and Mansor and based only on the invoices, the liquidator admitted the PODs. Nowadays documents are stored in a computer, and scanned copies of documents can also be saved in a pen drive or an external hard disk. When needed the documents can be reprinted and produced immediately. Astonishingly, Mr Tan Keng Beng of Sunrise and Stafford could not produce a single document relating to the works by Good Way and Mansor.

[43] Notably, the liquidator considered the statement of affairs in admitting the PODs. I must emphasise that the statement of affairs was signed by Tan Bee Yong, who has no knowledge of the operations and management of Sunrise, which was controlled by Mr Tan Keng Beng. How could she verify all the details in the statement of affairs? Furthermore, there were no supporting documents attached to the statement of affairs.

[44] The Court of Appeal in *Andrew Christopher* commented regarding the statement of affairs and held:

> [11] The learned judge had taken into consideration the various documents tendered by both parties to support his conclusion that LSSB did not take the loan for its own benefit. In particular he had considered LSSB's audit reports which are a requirement of law for the years 1997 and 1998 to show the movement of the company's financial activities. They did not reveal any loan taken from the appellant as opposed to LSSB's statement of affairs which did so. But he rightly ruled that they are merely statements made by the company's directors on the company's asset and liabilities. He said correctly that the status of the statement of affairs was not the same as that of the company's audit reports which were audited by a professional auditor.

[45] Similarly, in the case of *Kejuruteraan Letrik Man Hoe Sdn Bhd v Max-Benefit Sdn Bhd; Cergas Tegas Sdn Bhd (in liquidation) (applicant); Tow Lin Fook (intervener)* [2014] 1 LNS 642 the High Court held:

> 21. The liquidator also in the opinion of this court has basis to reject the POD as there was no supporting documents on the statement of affairs. *The statement of affairs are mere statements which means nothing if there are no documents* such as bills, vouchers or any kind of acknowledgments supporting the statement of affairs which will throw some light on whether the applicant is indeed a creditor. Devoid of these documents, the statement of affairs must be treated rightly with suspicion.
>
> 22. In this regard, all the provisions of rr 78, 79, 80 and 81 of WUR will denote the requirement of these supporting documents as particulars of the debt, in this case of the applicant as alleged creditor.
>
> 23. The liquidator in addition must not simply admit the POD but must have the duty to scrutinise the details of the same as required by 92 of the WUR. (Emphasis added.)

[46] The liquidator himself admitted in his affidavit in reply that 'the statement of affairs which although not conclusive, is good to have ...'. The statement of affairs submitted was devoid of documents and must be treated rightly with suspicion. Moreover, no audited report was provided by Sunrise to the liquidator. I am of the view that the liquidator has taken into account irrelevant considerations by considering the statement of affairs in admitting the PODs.

The judgment in default dated 8 April 2014

[47] Learned counsel for Chip Lam Seng contended that this court should go behind the judgment in default dated 8 April 2014. He further argued that the judgment in default against Sunrise is void because of undue preference.

[48] According to *McPherson's Law of Company Liquidation* (3rd Ed), in para 12–062, it is stated:

> In Australia it has been held that a liquidator is not estopped from considering the admissibility of a proof of debt arising from a judgment against the company and to which the company subjected itself ...
>
> However a liquidator is not able to reject entirely a proof based in a judgment where the debt was the foundation for the petition for winding up, although after saying that a liquidator is able, as is a trustee in bankruptcy, to go behind a judgment when examining a proof of debt, but there must be some suggestion of fraud, collusion or miscarriage of justice, or else the judgment is to be taken as conclusive.

[49] In the case of *Re Shruth Ltd; International Brands USA Inc v Goldstein and another; International Brands USA Inc and another v Haswell and others*

[2006] 1 BCLC 294 the law relating to the liquidator's power to go behind a judgment was discussed, where it was held:

> [31] It was common ground that there is a well-established principle that a liquidator or a trustee in bankruptcy has the power to inquire into the consideration for a judgment debt when adjudicating upon a proof of debt. The rationale for this is that otherwise a debtor might, by default, suffer judgment without any, or any adequate, consideration and thereby deprive his just creditors of their rights: see *Ex p Kibble, Re Onslow* (1875) LR 10 Ch App 373 and *Re Lennox, exp Lennox* (1885) 16 QBD 315. However, the judgment or order is conclusive, unless the consideration (ie the cause of action or the substance of the claim) can be questioned: see *Re Beauchamp* [1904] 1 KB 572. *In practice this means that the validity of the judgment debt will only be inquired into where there is evidence of fraud, collusion, or some other miscarriage of justice*. (Emphasis added.)

(See also: *Re Dawodu (a bankrupt)* [2001] All ER (D) 251 (Jan)).

[50] In its affidavits, Chip Lam Seng has not demonstrated that the judgment in default was obtained by fraud or collusion or that it amounted to a miscarriage of justice. According to *Re Shruth Ltd* there must be evidence of fraud, collusion, or some other miscarriage of justice. However, on the facts of the instant case, Chip Lam Seng has not suggested or provided any evidence of fraud, collusion or some other miscarriage of justice. Therefore, I do not consider it appropriate to go behind the judgment in default.

[51] After considering all the arguments by learned counsel, I am of the opinion that undue preference is not applicable in this case as the POD2 is based on a judgment in default obtained by Mansor, who later commenced winding up proceedings against Sunrise.

CONCLUSION

[52] Based on the above reasons, I allowed the second respondent's applications in encl 1 for Post Winding Up Application No AA-28PW-42–10 of 2019 and Post Winding Up Application No AA-28PW-43–10 of 2019. For each application, I allowed the costs of RM5,000 to be paid from the first respondent's assets to the second respondent and the third respondent to pay the costs of RM5,000 to the second respondent.

Second respondent's applications allowed with costs of RM5,000 for each

A *application to be paid from first respondent's assets to second respondent and third respondent to pay costs of RM5,000 to second respondent.*

Reported by Dzulqarnain Ab Fatar

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